91-609

No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

F. & J.M. CARRERA, INC.; F. CARRERA HNO., INC.; AMERICAN CHEMICAL, INC.; RECAITO, INC.;
Petitioners,

v.

CARLOS M. PIÑEIRO CRESPO, ZENAIDA CUBAS, AND THEIR CONJUGAL LEGAL PARTNERSHIP JOAQUIN RODRIGUEZ GARCIA, CARMEN L. BENITEZ, AND THEIR CONJUGAL LEGAL PARTNERSHIP;
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The right to at least one appeal to a higher court in civil cases is part of the due process guaranteed by the Fifth and Fourteenth Amendments of the Federal Constitution.

II. The Puerto Rico Judiciary Act Amendment of 1958, violates the guarantee of due process by limiting the absolute right to appeal established by the Constitution of the Commonwealth of Puerto Rico.

III. The Judiciary Act of Puerto Rico violates the Due Process of Law and Equal Protection constitutional guarantees by arbitrarily discriminating among litigants.

IV. The Supreme Court of Puerto Rico violated the due process by refusing to review contrary to the dispositions of the Judiciary Act.

V. The Supreme Court of Puerto Rico violated the due process constitutional guarantee by refusing to review a case without considering the transcript of the evidence alleged to have been wrongly weighted therefore not giving Petitioners a meaningful and fair opportunity to present their appeal.

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PETITION FOR A WRIT OF CERTIORARI

The undersigned Counsel on behalf of F. & J.M. Carrera, Inc., F. Carrera Hno., Inc., American Chemical, Inc., Recaito, Inc., petitions for a writ of Certiorari to review a decree of the Supreme Court of the Commonwealth of Puerto Rico.

OPINIONS BELOW

The Orders entered by the Supreme Court of Puerto Rico of which review is sought are not reported nor there is an opinion. (Appendixes A and B)

JURISDICTION

The above mentioned Orders were entered on June 14, 1991 and July 8, 1991, respectively. The jurisdiction of this Court is invoked under 28 USC 1258 (1988) which grants jurisdiction to this Court to review final decrees by the Supreme Court of Puerto Rico where the validity of a statute of the Commonwealth of Puerto Rico is questioned on the grounds of its being repugnant to the Federal Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part that:

No person shall *** be deprived of life, liberty, or property, without due process of law***.

2. The Fourteenth Amendment to the United States Constitution provides in relevant part as follows:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Article II, Section 7 of the Constitution of the Commonwealth of Puerto Rico provides in relevant part that:

> The right to life, liberty and the enjoyment of property is recognized as a fundamental right of man*** No person shall

> be deprived of his liberty or property without due process of law. No person in Puerto Rico shall be denied the equal protection of the laws***

4. Article V, Section 3 of the Constitution of the Commonwealth of Puerto Rico provides in relevant part as follows:

> The Supreme Court shall be the court of last resort in Puerto Rico***

5. The Puerto Rico Judiciary Act, as amended on June 26, 1958, by Section 2 of Act no. 115 (4 LPRA 37) provides in relevant part that:

> (a) Save as provided in subsections (d) and (e) of this section, final judgments rendered by the Superior Court in civil cases involving or deciding a substantial constitutional question under the Constitution of the United States or of Puerto Rico shall be appealable to the Supreme Court. Provided, that final judgments rendered in criminal cases originated in the Superior Court and in trial de novo before the Superior Court, shall be appealable to the Supreme Court or to the appellate session or division of the Superior Court, as the Chief Justice may determine pursuant to the regulation adopted to such effect by the Supreme Court. Once the bill of appeal is filed, all proceedings in the Superior Court shall be stayed with respect to the judgment or the part thereof appealed from, or the questions comprised therein; but the Superior Court may proceed with the action as to any other question involved therein not comprised in the appeal, and, if the judgment appealed from provides for the sale of things susceptible of loss or deterioration, it may direct that same be sold and that the proceeds be deposited until the Supreme Court renders judgment.
>
> (b) Any other final judgment of the Superior Court may be reviewed at the request of the aggrieved party by the Supreme Court through a writ of review to be issued at its discretion***

STATEMENT OF THE CASE

The questions presented through this petition arose when the Supreme Court of Puerto Rico, based on the discretionary jurisdiction granted by the Puerto Rico Judiciary Act as amended on 1958, denied review of a judgment entered by the Superior Court of Puerto Rico, San Juan Part in the case entitled *Carlos M. Piñeiro Crespo and his wife Zenaida Cubas; Joaquín Rodríguez García and his wife Carmen L. Benítez, and the respective conjugal partnerships constituted by them v. American Chemical Corporation and/or American Chemical, Inc.; F. Carrera & Bro., Inc.; F. & J.M. Carrera, Inc.; Carreraito, Inc.; Recaito, Inc.; John Doe and Richard Roe,* Civil Number 85-1797 (905).

The Orders by which the Supreme Court of Puerto Rico denied review of the judgment entered in the above mentioned case violate the constitutional guarantee of due process of law and upheld the validity of the Puerto Rico Judiciary Act, as amended in 1958, which also is repugnant to the Constitution of the United States of America because it infringes on the due process and the equal protection of the law guaranteed by the Federal Constitution and by the Constitution of the Commonwealth of Puerto Rico.

Petitioners raised the constitutional claims promptly, through motions for reconsideration to the Supreme Court of Puerto Rico (Appendixes D and E) within the time and space limitations that Rules 31(e) and 45(b) of the Rules of the Court impose. According to these rules a motion for reconsideration will be limited to ten pages and it has to be filed within ten working days after the Supreme Court issues the order, judgment or opinion to be reconsidered.

Through the above mentioned motions for reconsideration, Petitioners presented their constitutional infringement allegations. The Supreme Court of Puerto Rico denied all motions of reconsideration. (Appendixes A and B).

Confronted with the Supreme Court's denial the Petitioners decided to file a petition of writ of Certiorari before this Court. To that effect, Petitioners filed a motion informing the Supreme Court of Puerto Rico their intention to file Certiorari and moved for a stay of the Court's mandate (Appendixes G, H, S).

The Supreme Court of Puerto Rico denied the motion to stay the mandate (Appendix C), even though Petitioners had deposited on October 18, 1990, in the trial court, a supersedeas bond of $502,000.00, and later on July 3, 1991, deposited in court the amount of the trial court's judgment equivalent to $529,356.00. (Appendix R). The Superior Court authorized respondent to withdraw the amount awarded by the judgment regardless of Petitioners objection. (Appendix S).

The Superior Court, San Juan Part, the Hon. Evaristo M. Orengo, Jr., presiding, entered judgment for Respondents (Appendix Q) adopting a judgment draft submitted ex-parte by Respondent's counsel after denying Petitioners the opportunity to file a brief at the conclusion of the trial.

Petitioners requested the Supreme Court of Puerto Rico to review the judgment entered by the Superior Court (Appendix I) on the grounds that the lower court erred when it determined that the contract executed on August 24, 1982, by virtue of which Respondents sold to Petitioners their option to purchase 43,491 common shares of American Chemical Corp. (American), established a deferred price of $300,000 payable annually over a period of five years, and not a conditional obligation to pay a participation by means of dividends equal to 25% of American's profits for a period of five years and up to a maximum of $300,000. Such finding is contrary to the terms and conditions contained in the written contract drafted by Respondents and to respondent Piñeiro's admission through depositions in evidence as to the conditional character of the obligation.

As the purchase and sale agreement on the option, established a conditional obligation to pay Respondents a participation equal to 25% of American's profits for a period of five years and up to a maximum of $300,000, the lower court erred when it ordered Petitioners to pay $290,000, when there is no evidence in the record that American had sufficient profits during the five years after 1982 to pay Respondents said amount as a participation equal to 25% of said profits.

Petitioners also requested from the Supreme Court of Puerto Rico to order a transcript of the oral evidence (Appendix J). Both the petition for review and transcript of oral evidence were denied

(Appendix K). Motions for reconsideration were filed (Appendixes L and M), and the same were denied. (Appendix P)

REASONS FOR GRANTING THE WRIT

I. The right to at least one appeal to a higher court in civil cases is part of the due process guaranteed by the Fifth and Fourteenth Amendments of the Federal Constitution.

Traditionally, the functions of the appellate court have been identified as follow. First is to correct errors thus to prevent and avoid injustice.

> "The most obvious functions of appellate review is to correct errors in the trial court. —It is inevitable that mistakes will be made in any process that depends upon humans to ascertain facts or law in thousands of cases involving adverse parties...
>
> Error correction is concerned primarily with the effect of the judicial process in the trial court upon the individual litigant and is intended to protect that person from arbitrariness in the administration of justice. Error correction also provides an outlet for unhappiness and dissatisfaction with the system that results from losing in the trial court." Robert J. Martineau, *Modern Appellate Practice Federal and State Civil Appeals*, §1.8, 19 (1983)

The second function is to project uniformity and harmony in the rule of law described as "institutional" review and has a two fold purpose.

> "One is to provide an opportunity for the common law to develop, thereby permitting it to reflect the demands of the individuals and institutions that the law serve as well to accommodate factual situations substantially different from those in prior cases... The second functions is to enforce the law as declared by both judicial and legislative bodies." Martineau, supra, at 20.

The third function of the appellate court is to create and amend rules of law for the guidance of lower courts, the lawyers and clients. Robert N. C. Nix, *The View From the Appellate Bench, Apellate Advocacy*, sponsored by the ABA, 4 (1981).

In 1988 Congress acted to virtually abolish the Court's mandatory jurisdiction. Presently, all but a handful of cases are issue in a discretionary manner. However, there is a right to at least one appeal from the Federal District Courts to the Circuit Courts of Appeal.

On the other hand, the great majority of the states through time came to adopt a right to at least one appeal.

Between 1950-1975 the number of appeals doubled and in some states the number of appeals tripled. Between 1973 and 1983 the numbers of appeals in over half of the states increased over 100%, being the overall increase among the states equivalent to a 112%. The National Center for State Courts concluded that the referred increase was more than ten times the population growth, and the increase was four times faster than the growth of trial court judgeships and three times faster than the growth of appellate judgeships. Robert L. Stern, *Remedies for Appellate Overloads: The Ultimate Solution*, 72 J. Am. Jud. Soc. 103 (1988).

Provoked by the litigation explosion each state developed a system of appellate review to respond to the increased burden on appellate courts, but no uniform pattern was adopted. Therefore, due to the increase in their docket numbers the appellate process in the various states has been continuously adjusting to accommodate the demands of their constituents. The most common response to the problem has been to preserve the right to an appeal by adopting an intermediate appellate court which would emphasize in correcting errors and leaving the Supreme Court of the State with the exclusive function of attending issues of great public interest and the development of law.

Therefore, the vast majority of the states have adopted intermediate appellate courts. The structure of an intermediate court is created to guarantee the right of an appeal and fulfill all functions of the appellate courts: correction of errors and development of law. Through the structure a more efficient system is acquired without sacrificing the principal functions of appeal.

Those states that do not have adopted intermediate court have at least one appeal as of right to their highest court, with the exception of West Virginia, New Hampshire and Puerto Rico. Graham C. Lilly & Antonin Scalia, *Appellate Justice: A Crisis in Virginia*, 57 Va L. Rev. 3, 12 (1971); Robert L. Stern, *Appellate Practice in the United States*, Sec. 1.5, 19 (1981); Alex S. Ellerson, *The Right to Appeal and Appellate Procedural Reform*, 91 Columbia L. Rev. 373 (1991)

In West Virginia, a petition for leave to appeal is filed with the Supreme Court of the State which will decide whether the leave shall be granted. The Petition of Appeal presents the legal arguments as an expanded brief and may direct the appellate court to examine some or all of the trial court records. Also said petition can require an opportunity for oral argument. The appeal will be heard in full court if the panel or the court believes that the decision below was erroneous and perhaps also if the court thinks the issues are sufficiently important. The differences between disposing of appeals in this way and the customary full treatment is that appellant's presentation of argument is expected to be less than a full brief on the merits. Perhaps in West Virginia the denial of leave is in effect a summary affirmance on the merits, but without oral arguments before the court is not very different from what may other courts do in dispensing an argument after determining from briefs that the appeal presents no substantial question. Therefore, one most conclude that West Virginia does not have an absolute right of appeal but, that the differences between said state's appellate procedure and those of the rest of the country are a matter more of form than of substance. Stern, *Apellate Practice in the United States*, supra, at 20; Ellerson, supra, at 385 n. 62.

In Puerto Rico the Judiciary Act Amendments of 1958 eliminated the right to appeal in civil cases from decisions of the Superior Court. As a result, the Supreme Court of Puerto Rico has discretion over all civil appeals submitted. In Puerto Rico the petition for review allows only a superficial examination of the appeal due to the following: i) it is restricted to twenty (20) pages in which the appellant must present a statement of the case, cite and argue the errors committed by the trial court, without a transcript of the oral evidence presented to the trial court, therefore, not being able to elaborate a full brief; and ii) not having an opportunity to persuade the court with an oral argument.

It is important to emphasize that the Supreme Court of Puerto Rico can deny to issue a writ without giving the reasons for said denial.

The result of the above is that the Supreme Court of Puerto Rico in cases like the present one, refuses to issue writs without giving appellants a real opportunity to present their case in contravention to the basic concept of justice as protected by the constitutional guarantee to a due process of law.[1]

This Court must be vigilant to assure that no judicial system under the Federal Constitution will adopt an appellate process which does not recognize a right to at least one appeal, as has been actually recognized in a *de facto* manner by the states and by the federal judicial system, as part of the constitutional guarantee due process of law.

The interpretation of the due process clause must be as evolutionary as the law itself and it cannot be inflexible and hold on to precedents which represent the judicial reality of one hundred years ago.

In 1894, the Supreme Court in *McKane v. Durston*, 153 US 684 (1894), adopted an interpretation of the due process clause which is regarded as one of the most important stepping stones of the appellate procedure legal doctrine in the United States. In *McKane* this Court indicated in dicta, that an appeal is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. The Court concluded that an appeal was not a "necessary element" of due process of law and that the states had discretion as to allow such a review through their constitution or through special legislation. The Court did not discuss the grounds of such a decision, instead the referred opinion only indicated that there was no recognition of a right to appeal in common law and that "...a citation

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1 The Supreme Court of Puerto Rico refused to review the present case despite due process was not accorded at trial for the following reasons: i) the trial court denied Petitioners the opportunity to file a brief; ii) it accepted a judgment draft submitted ex-parte by Respondent's counsel; and iii) completely disregarded all the oral and documentary evidence presented by Petitioners while adopting the above mentioned judgment draft.

of authorities upon the point is unnecessary." *McKane v. Durston,* 153 US 684, at 687.

> "The Supreme Court has on a number of occasions reaffirmed its position in *McKane* that the right to appeal is not guaranteed by the due process clause. However, these assertions likewise have been dicta because no case reaffirming *McKane* has ever involved a state law that purported to dispense entirely with the right to appeal in serious criminal cases..." Ellerson, supra, at 377.

Although *McKane v. Durston* 153 US 684 only contains a dicta it has been cited over and over in criminal as well as civil cases, promoting the understanding that there is no recognition of a constitutional right of appeal as part of the guarantee of due process of law. The Court has not given additional grounds for such interpretation of the guarantees required by the due process.

In a more recent opinion, *Lindsey v. Normet,* 405 US 56 (1971) this Court citing various cases confirmed *McKane* indicating:

> "This court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a state to provide appellate review." *Griffin v. Illinois,* 351 US 12, 18 (1956); *District of Columbia v. Clawans,* 300 US 617, 627 (1937); *Ohio v. Akron Park District,* 281 US 74, 80 (1930); *Reetz v. Michigan,* 188 US 505, 508 (1903); *McKane v. Durston,* 153 US 684, 687-688 (1894), and "**The continuing validity of these cases is not at issue here.**" (our emphasis) *Lindsey v. Normet,* 405 US 56, at 77.

Presently, the right of appeal is part of the appellate procedure adopted by the whole nation and therefore in a *de facto* manner, it is already considered to be required by the due process of law. The grounds for the *McKane* opinion no longer exist and the case law should reflect this development.

> "Even if the Court's statements in *McKane* and in the subsequent cases upholding it represented the Court's holdings rather than dicta, the Fourteenth Amendment conception of due

> process—whether procedural, as in this case, or substantive—is not static. Due process is a progressive concept. It is perhaps, as Justice Frank further has suggested, "the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of progressive society. Because of this progressivity, the catalogue of procedural rights that are incorporated into the due process clause can change over time—and sometimes the change can occur exceedingly quickly." Ellerson, supra, at 382.

It is important to acknowledge that the case law does not confront the actual validity of the *McKane* doctrine because there has been no need to. Almost all judiciary systems under the Federal Constitution already recognize a right to one appeal, therefore, actually there are not many people directly affected by *McKane*.

All functions of appellate courts are indispensable for a judicial system to work properly. The correction of errors, the promotion of uniformity and the creation of principles of law, for the guidance of lower courts as well as the society in general, are fundamental in a democracy. None of said functions is more important than the others and to unattend any of them will be a sacrifice of the quality of the justice offered. See *ABA Commission on Standards of Judicial Administration: Standards Relating to Appellate Court*, 3 (1977); Robert J. Martineau, *The Appellate Process in Civil Cases: A Proposed Model*, 63 Marq. L. Rev. 163, 165 (1979).

> "It is almost axiomatic that every losing litigant in a one-judge court ought to have a right of appeal to a multijudge court. Most do not appeal, but the right is a protection against error, prejudice, and human failings in general. This relates to the appellate function of rectifying trial court errors, of seeing to it that litigants receive justice according to law. It is assumed correctly that a collegial body, removed from local pressures, sitting calmly in a quiet atmosphere with each judge thinking independently, is best able to catch mistakes and remedy them. The ideal of impartial justice can thus be approached." Robert A. Leflar, *The Internal Operating Procedures of Appellate Courts*, American Bar Foundation, 4 (1976).

Furthermore, the Commission on Standards of Judicial Administration of the American Bar Association in a report submitted in 1977 strongly stated:

> "The right of appeal, while never held to be within the Due Process guarantee of the United States Constitution, is a fundamental element of procedural fairness as generally understood in this country..." ABA: Standards Relating to Appellate Court, supra, at. 14.

One of the most important aspects of having a right to an appeal is that it satisfies the basic need of the parties, lawyers and public, that the results of their cases are not up to just one human being sitting as a judge in a trial court.

> "The absolute right of a litigant to have its case reviewed by a higher court gives him a little more assurance that he will not become the victim of human error, however sincere. It relieves him completely from the fear of being subjected to the whim or abuse of a tyrant. It gives time for sober second thoughts as to the issues which are presented, and it permits the case to be reconsidered in a calmer atmosphere, after the heat of battle is over. And, a review on appeal enlists the thinking and deliberation of more than a single mind in determining those issues. It is true that the exercise of the right of appeal delays the final disposition of the case, but when important personal or property rights are involved the greater assurance that justice will be accomplished in that case and in others more than offsets the injury occasioned by the delay.
>
> ... The absolute right of appeal is truly a fundamental safeguard of justice..." John T. Hood, Jr., *The Right of Appeal,* 29 La L Re. 498, 520 (1968-1969).

The situation in the Commonwealth of Puerto Rico is a perfect example of what can happen if the right of appeal is not recognized by this Court as a requisite of the due process of law. Due to the discretionary jurisdiction of appeals given by our Judiciary Act, cases like the present one are not being subject to appellate review. Therefore the judges in the trial courts have become the only ones

who will have a saying in the result of the vast majority of the judicial controversies brought before them. Said conditions of appellate review enable judges of the trial court to disregard the law and the evidence and thereby leaving the litigant subject to their human weaknesses.[2]

If there is no constitutional guarantee of a right of appeal some judicial systems could validly abolish appeals permitting a lack of uniformity among the trial courts, having no supervision over human error, and allowing trial judges to do as they please without worrying that a higher court will review their opinion. This Court must recognize the right of appeal to preserve the dignity, authority and acceptability of our judicial systems.

> "...[to assure] The decision makers at the first level that their correct judgment will not be, or appear to be, the unconnected actions of isolated individuals, but will have the concerted support of the legal system; and [to assure] litigants that the decision in their case is not a pray to the failings of whichever mortal happened to render it, but bears the institutional imprimatur and approval of the whole social order as represented in its legal system. Thus, the review of correctness serves to reinforce the dignity, authority, and acceptability of the trial and to control the adverse effects of any personal short comings of the basic decision-makers." Paul D. Carrington,

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2 In the present case the adopted judgment by the trial court was produced in an ex-parte manner by respondent's legal counsel, as a draft of judgment. Due to that fact, the judgment adopted by the trial court is full of manifest errors of fact and as result it also contains errors of law. Regardless of the validity of the errors alleged, the fact that the judgment adopted by the trial court is a draft submitted by one of the parties should be enough to conclude that there is a need to review the judgment. According to the case law, as well as basic principals of justice, the trial judgment should have been reviewed. Instead of issuing the writ, the Supreme Court of Puerto Rico decided, in a 3 to 2 votes, not to issue the writ. *Román Cruz v. Díaz Rifas*, 13 Official Translation of the Opinions of the Supreme Court of Puerto Rico 642 (1982); *Malavé v. Hosp. de la Concepción*, 100 PRR 54 (1971); *Arroyo v. Rattan Specialties*, 17 Official Translation of the Opinions of the Supreme Court of Puerto Rico 43 (1986); *United States v. Forness*, 125 F2d 928 (2nd. Cir. 1942).

Daniel J. Meador & Maurice Rosenberg, *Justice on Appeal*, 2 (1976).

Due to the overload of the Supreme Court of Puerto Rico, in 1958 the Legislative Branch approved amendments to the Judiciary Act which limited the civil appellate jurisdiction of the court as of right to cases which involved a "substantial constitutional question" and converted the appellate jurisdiction in all other civil cases from the Superior Court in discretionary. In practice the real effect that the amendments have had in the appellate procedure to the Supreme Court of Puerto Rico is to practically eliminate the appeal from the Superior Court's civil proceedings.

First, the appeal as of right in cases which involve a "substantial constitutional question" has developed to become for all effects discretionary. The Supreme Court of Puerto Rico has interpreted what is considered to be a "substantial constitutional question" in such a way that for all practical purposes the court converted said petition of appeal in one which is discretionary also. *Calderón, Rosa Silva & Vargas v. García*, CE-86-361, Opinion of the Supreme Court of Puerto Rico (April 6th., 1988).

On the other hand, through time the Supreme Court of Puerto Rico has reduced dramatically the percentage of writs issued. During 1957-1958 to 1963-1964 the Supreme Court issue approximately 45.2% of all the petitions of appellate review filed. Between 1981-82 to 1984-85 the percentile of writs issued by the Supreme Court was maintained to approximately a maximum of 33.5% and a minimum of 29.0%. From 1985-86 to 1988-89 the percentage started to decrease more drastically 20.87, 23.87, 22.27 and 18.6% respectively. During the 1989-1990 term the Supreme Court issued 126 discretionary writs while denied 1202, that is to say that **the Supreme Court during said term only issued 9.49% of the discretionary writs filed.**[3]

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3 Statistics were provided by the Office of Statistics of the Supreme Court of Puerto Rico, also see Antonio García Padilla and José Julián Alvarez, *El Tribunal Supremo de Puerto Rico: La Corte de Pons*, 59 Rev J UPR 185, 222, N. 111

The situation in Puerto Rico is alarming to the legal community as well as to the public in general. In 1987 a Commission designated by the Chief Justice of the Supreme Court of Puerto Rico, Hon. Victor Pons, studied, among other things, the efficiency of the appellate procedure of the court. **Said commission considered the statistics up to 1985 and concluded that to improve the quality of justice and to respond to the need of a real opportunity of appellate justice, the discretionary review should be eliminated completely so that all litigants would have the security that their case will be reviewed by a higher court.** *Informe de Comisión Asesora de Juez Presidente*, 48 Rev. CA 7, 11 (1987).

Also, the Commissions recommended the creation of an Intermediate Appellate Court which would focus on the correction of errors, therefore relieving the burden on the Supreme Court without affecting the quality of the appellate review offered.[4] *Informe de la Comisión Asesora del Juez Presidente*, supra, at 40.

Due to the fact, that this Court has not recognized the right of appeal as part of the due process of law, the legislative Branch of Puerto Rico does not feel the pressure or obligation to create an intermediate Court of Appeals which as recommended by the Commission would guarantee the existence of appellate review in Puerto Rico. Instead, and regardless of the public condemnation of our lack of appellate review, the Legislative Branch avoids investing resources and leaves the problem to the Supreme Court of Puerto Rico. On the other hand, the Supreme Court of Puerto Rico does not have the resources to deal appropriately with the amount of cases filed and has chosen to disregard the vast majority of them. At the end, the

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(1990); *Informe de la Comisión Asesora del Juez Presidente*, 48 Rev.CA 7, 40 (1987).

4 The Commission concluded that in Puerto Rico there is a need for a right to appeal based on the overall discontent of the public and legal community, the number of writs issued by the Supreme Court of Puerto Rico, the need of uniformity among the trial courts as well as the urgent necessity to increase the trust of the Puerto Rican people in our judicial system. The discontent of the legal community as well as the public is well evidenced. See Miguel A. Velázquez, *No ha lugar*, 51 Rev J UPR 453 (1982); Francisco Castro Amy, *La Inmoralidad del No Ha Lugar*, 46 Rev CA 7 (1985).

ones who really carry the burden of not having a right of appeal officially recognized as part of the guarantee to a due process of law, are the people who turn to the judicial system looking for justice and end up under the whim of one man, the trial judge.

II. The Puerto Rico Judiciary Act Amendment of 1958 is unconstitutional and the refusal of the Supreme Court of Puerto Rico to review the case violates the guarantee of a due process of law by limiting the absolute right to appeal established in the constitution of the Commonwealth of Puerto Rico.

Puerto Rico has always been a civil law jurisdiction and as a result of the influence of civil law tradition the Organic Act of the Judiciary of May 15, 1950 established a right of appeal.

Two years later, the Judiciary Act of 1952 was adopted and became effective on the same day as the Constitution of Puerto Rico, July 25th., 1952. The Judiciary Act of 1952 which reorganized the hierarchy of the courts also recognized the right of appeal. At this time, the Supreme Court suffered no change in its original or appellate jurisdiction.

As to the Constitution of the Commonwealth of Puerto Rico, Section 3 of Article V creates one supreme court as the court of last resort of a unified system of courts.

It has been well recognized that the essential function of a court of "last resort" is to review judgments adopted by lower courts. *Chamberlan v. Delgado*, 82 PRR 6, 12 (1960)

The referred Section 3 of Article V creates a right of appeal which is evidenced by the recommendations submitted by the commission of the drafters of the Constitution of the Commonwealth of Puerto Rico, in charge of the creation of the Judicial Branch. Said commission recommended that the constitution itself guarantee a court of last resort which would guarantee a right of appeal. The mandate of a right of appeal is also evidenced in the debate of the framers of the constitution, when Delegate Miguel Angel García Méndez, while discussing if the Supreme Court of Puerto Rico should have original jurisdiction over constitutional cases, indicated that if the constitution confers such original jurisdiction it would not affect in any way "the right of appeal" already established in the first line

of the section. *Diario de Sesiones de la Convención Constituyente*, 2609 (November 28th., 1951).

In 1958, due to an overload of cases in the Supreme Court of Puerto Rico, the right to appeal was restricted by amendments to the Judiciary Act, limiting the Supreme Court's civil appellate jurisdiction to involving substantial constitutional questions. All other civil judgments issued by the Superior Court, in its original jurisdiction, would only be reviewed discretionally by the Supreme Court.

Although the petitioner alleged to the Supreme Court of Puerto Rico that the Amendments of 1958 are unconstitutional because restrict the right to appeal as established by the Constitution itself, the Supreme Court of Puerto Rico avoided confronting the issue denying the motions for reconsideration. The Supreme Court did not give any reason whatsoever for its denial regardless that the argument clearly constitutes a substantial constitutional question of great public importance.

The Supreme Court of Puerto Rico had an opportunity to interpret our Constitution and it avoided to confront the issue. By doing so it leaves the issue in the hands of this Court. Therefore it is of first public interest that this Court examine the constitutional argument raised by the Petitioners. *Posadas de Puerto Rico v. Tourism Company*, 478 US 328 (1986).

This Court, being the only resort available, must take into consideration that the Supreme Court of Puerto Rico does not have the resources available to handle appropriately a right to appellate review, therefore, said court will refuse to interpret the constitution regarding the appellate right because it would affect its operations directly.

For interpreting the Constitution of Puerto Rico the Supreme Court of Puerto Rico is obliged to take into consideration the debate between the constitutional delegates and drafters as referred to above. The discussion demonstrates that the drafters intended to include in the Constitution itself a right to appeal which therefore would have had to be recognized by the Supreme Court of Puerto Rico. *PSP v. ELA*, 7 Official Translations of the Opinions of the Supreme Court of Puerto Rico 653 (1978). Also see *López v. Policía de Puerto Rico*,

R-85-271, Opinion of the Supreme Court of Puerto Rico (January 22, 1987), *Pueblo v. Hernández*, CE 85-712 (May 11, 1987).

The 1958 Amendments of the Judiciary Act of Puerto Rico are unconstitutional and the Supreme Court of Puerto Rico avoided confronting the issue. This Court is the only resort available that can enforce the right of appeal created in the Constitution of the Commonwealth of Puerto Rico.

III. The Judiciary Act of Puerto Rico violates the due process of law and equal protection constitutional guarantees by arbitrarily discriminating among litigants.

In the event that this Court does not recognize the right of appeal as a requirement of the constitutional guarantee of due process of law or does not recognize a right of appeal in the Constitution of the Commonwealth of Puerto Rico, Petitioners allege in the alternative, that in accordance with the legal doctrine adopted by this Court the Judiciary Act of Puerto Rico violates the due process and the equal protection clause. The violation is based on the fact that the statute creates appellate review but it also arbitrarily discriminates in the availability of said review.

First the Judiciary Act, Section 122, establishes a right to appeal from any final judgment of the District Court of Puerto Rico to the Superior Court. Furthermore, section 122 specifies that further review thereafter shall be only by certiorari to the Supreme Court of Puerto Rico which will only be granted by that court's discretion. Judiciary Act of July 24, 1952, 4 LPRA Sec. 122 (1952).

On the other hand, Section 37 of the Judiciary Act indicates that the Supreme Court of Puerto Rico shall review all judgments rendered by the Superior Court in civil cases involving a "substantial constitutional question", under the Constitution of Puerto Rico or United States, and all final judgments rendered in criminal cases in the Superior Court are reviewed by the Supreme Court, any other final judgment of the Superior Court are reviewable by the Supreme Court at its discretion. Judiciary Act, as amended on June 26, 1958, 4 LPRA Sec. 37 (1958).

The District Court of Puerto Rico has jurisdiction over all civil controversies under $10,000.00 excluding interest. Judiciary Act as

amended 1974, 4 LPRA §§121, 181 (1974). Therefore, the Judiciary Act arbitrarily discriminates against civil cases over $10,000.00, which do not involve a substantial constitutional question, permitting appellate review only at the Puerto Rico's Supreme Court discretion. All cases under $10,000.00 will not only have a right to at least one appeal, but also after said appeal they can turn to the Supreme Court asking for additional review through a petition for certiorari which could be granted at the court's discretion.

There is no justification for this unequal treatment. In fact, if it were the other way around it could be argued that the appellate process' cost of cases which involve quantities of less than $10,000.00 are more expensive that the value of the case itself, which if well evidenced, could be determine to be a justification for unequal treatment. However, **the Judiciary Act gives more protection to cases involving less than $10,000.00 than to cases involving larger quantities of money**. This unequal treatment is arbitrary and violates the equal protection guarantee of due process.

This Court has established that if a state provides appellate review it then has to follow the due process and equal protection requirements established by the Fourteenth Amendment of the Federal Constitution. Therefore, a state that grants appellate review must exercise said review without discrimination. *Lindsey v. Normet*, supra, at 77. Also see *National Union v. Arnold*, 348 US 37, 43 (1954) and *Griffin v. Illinois*, 351 US 11, 18 (1955).

It is clearly arbitrary and unreasonable that a litigant having a controversy of less than $10,000.00 receives more protection than a litigant of a controversy over $10,000.00. The litigant of less than $10,000.00 has a right to an appeal, therefore, not being under the mercy of one judge alone, while the litigant of more than $10,000.00 will not have a right to appeal.[5] The treatment is arbitrary and contrary to the due process of law because without justification it treats differently litigants whose only difference is the quantity of their

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5 Since the Supreme Court last year issued only 9.49% of all discretionary writs filed, the probability is that said litigant will be subject to the will and decision of one human being, his trial judge.

controversies; the litigant of less than $10,000.00 receiving more protection from the judicial process than the litigant of more than $10,000.00.

IV. The Supreme Court of Puerto Rico violated the constitutional guarantee of Due Process by refusing to review contrary to the dispositions of the Judiciary Act.

According to the report submitted by the Judiciary Commission of the House of Representatives in relation to the 1958 amendments to the Judiciary Act of Puerto Rico, as well as according to the debate over the proposed amendments in the senate floor, the purpose of said amendments was to relieve the Supreme Court of Puerto Rico from an overload of cases and accumulation of pending cases. To that effect the legislative branch decided, with a few exceptions, to transform the appellate civil jurisdiction of the Supreme Court of Puerto Rico in discretionary. The Commission's report as well as the discussion in the senate floor indicate that through this amendment the Supreme Court of Puerto Rico would have a means to disregard rapidly all **vicious** and **frivolous** cases filed for appellate review. The discretion given to the Supreme Court was created exclusively to eliminate vicious and frivolous appeals.[6]

Rule 3(a) of the Rules adopted by the Supreme Court of Puerto Rico to regulate the internal procedures of the court, indicate:

> "...The decisions of the court in full shall be adopted by a majority of the justices who participate, but no law shall be held unconstitutional except by a majority of the total number of justices of which the court is composed.
>
> For the issuance of a writ by the Court in full the votes of at least half of the justices who participate shall be required." Rule 3(a)

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6 See *Informe Sobre la Congestión y Demora de los Litigios en Puerto Rico P. de la C. 342, y P. de la C. 476*, Cámara de Representantes del Estado Libre Asociado, 3ra. Asamblea Legislativa del Estado Libre Asociado de Puerto Rico (May 9, 1958). Also see *Andino v. Fajardo Sugar Co.*, 82 PRR 81, 89 (1961).

of the Rules of the Supreme Court of Puerto Rico, as amended in 1978, 4 LPRA App. I-A, R.3 (1978).

The Supreme Court of Puerto Rico, which is composed of seven justices, denied the Petition of Review filed by Petitioners having the following composition: Chief Justice Pons Núñez and Associate Justices Hernández Denton and Naveira de Rodón voted not to issue the writ; Associate Justices Rebollo López and Andreu García voted to issue the writ; Associate Justices Alonso Alonso and Negrón García abstained. Therefore of five participating judges, three voted to deny the Petition or review and two voted to issue the writ.

According to the referred rule 3(a), half of the judges had to vote to issue the writ for the Supreme Court of Puerto Rico to consider the writ on its merits. Therefore the positive vote of three judges would be required for a court composed of six participating judges as well as for a court of five judges. This difference is arbitrary and does not relate in any way to the Judiciary Act's end to disregard vicious and frivolous cases. When there is a court of five participating judges, according to the rule adopted by the Supreme Court of Puerto Rico, to issue a writ it is required the same amount of votes as to resolve a writ on its merits.

Taking into account the limited time and resources the Supreme Court of Puerto Rico has to evaluate if a Petition should be issued or not, the vote of one of its members should be enough to discard the possibility that the Petition is frivolous or vicious specially when considering that the decision to issue the writ or not will affect the only chance of an appellate review.[7]

When the appeal is discretionary it has been accepted that it is the duty of the appellate court to deny the petition when the decision complained is plainly right as **it is also the courts obligation to grant it when there is any doubt as to the propriety of the decision**. Lilly & Scalia, supra, at 13.

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7 In the case at hand, not one but two of five judges regarded the Petition worthy of consideration, therefore, it is impossible that the case be discarded as frivolous or vicious for the court to justifiably deny appellate review.

A discretionary petition of review to be considered frivolous or vicious must completely lack merit. *Otero Fernández v. Alguacil*, 16 Official Translations of the Opinions of the Supreme Court of Puerto Rico 906 (1985); *Fournier v. González*, 80 PRR 341 (1958).

Through its denial the Supreme Court of Puerto Rico is abusing the discretion given by the legislator through the Judiciary Act to exclusively eliminate vicious and frivolous cases. The court is not acting in accordance to the legislative mandate. The power of discretionary appellate jurisdiction must have been exercised by the Supreme Court and by not doing so it committed an abuse of discretion in violation of the due process of law constitutional guarantee.

V. The Supreme Court of Puerto Rico violated the due process constitutional guarantee by refusing to review without considering the transcript of the specific evidence alleged to be wrongly appreciated, therefore not giving appellant a meaningful and fair opportunity to present his appeal.

Petitioners alleged to the Supreme Court of Puerto Rico that the judgment of the trial court contains manifest errors in the weighing of the evidence presented and therefore has clearly erroneous findings of facts and subsequently erroneous findings of law. To that effect, petitioners moved for an order of the Supreme Court for the transcript of specific parts of the testimonial evidence presented in trial.

The Supreme Court of Puerto Rico refused to issue the writ without having first examined the transcript of the evidence, not giving to petitioner's argument the consideration it deserves. The Supreme Court through its denial violated the due process of law guaranteed by the Constitution not giving petitioner an adequate opportunity to present his claim fairly.

When evaluating a claim of due process deprivation this Court has held that the following three factors must be considered the private interest affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used; and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest. *Mathews v. Eldrigde*, 424 US 319, 335 (1976).

The private interest at stake is Petitioner's opportunity to participate meaningfully in a judicial proceeding in which his property is at stake. Petitioners intend to protect their interests by obtaining procedural protection that will provide them a full and fair opportunity to present their case for review and therefore ensure adequate functioning of the adversary system. On the other hand, the risk of erroneous deprivation of said interest is enhanced by the failure of the Supreme Court of Puerto Rico to order and to consider the referred transcript.

Petitioners' case carries greater significance when considering that their petition for review to the Supreme Court of Puerto Rico was their only opportunity to obtain appellate review in the Commonwealth's judicial system.

The due process mandate of fundamental fairness requires the Supreme Court of Puerto Rico to examine the transcript of the specified evidence, before determining to issue the writ or not, when the petition is based on a manifest error of the trial court's weighing of the evidence. The examination of the transcript of the specified evidence or an adequate substitute would guarantee that the Supreme Court evaluated the Petition of Review properly and therefore it would guarantee that petitioner had a fair and meaningful opportunity to present his appeal. *Bundy v. Wilson*, 815 F 2d. 125 (1st. Cir. 1987) and cases cited therein.

Although the Judiciary Act of Puerto Rico indicates that it is discretionary of the Supreme Court of Puerto Rico to issue the writ of review, said Court must follow the due process mandate to safeguard and assure the fair disposition of the cases filed. *Evitts v. Lucey*, 469 US 387, 401 (1985).

The First Circuit Appellate Court in *Bundy v. Wilson*, 815 F2d. 125, resolved a similar case where the state's Supreme Court had discretionary appellate jurisdiction over a criminal case and refused to issue the writ without considering the transcript of the evidence. Said Appellate Court held that the state court violated the due process of law guarantee.

> "...We think it impossible for a reviewing court to make even a rough assessment of the sufficiency of the evidence without some reference to the trial court record. The accuracy of this

rough assessment is specially important in New Hampshire for it will most likely determine the 'desirability' of accepting the appeal." (our emphasis) *Bundy v. Wilson*, 815 F2d. 125, at 133.

CONCLUSION

Due to the foregoing, which reveals the necessity of the intervention of this Court, the Petition for a writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED.

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